

No. 12,808

United States Court of Appeals
For the Ninth Circuit

BANKERS LIFE COMPANY (a corporation),
Appellant,

vs.

RUTH JACOBY,

Appellee.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

APPELLANT'S CLOSING BRIEF.

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**THE ARKANSAS PROCEEDINGS ARE NOT BINDING
ON APPELLANT.**

Not being a party, the Arkansas proceedings are not binding on the appellant.

Harrisberry v. Lee, 311 U.S. 32, 85 L. Ed. 22;
50 *C.J.S.* 288, 385;
34 *C.J.* 974, 1046, 1050.

The foregoing principle was specifically applied by the Supreme Court of Arkansas to life insurance policies in the case of *Pedron v. Olds*, 193 Ark. 1026, 105 S.W. (2d) 70. In that case two separate parties claimed to be beneficiaries under two policies of life insurance. One set of beneficiaries brought suit

against the other beneficiaries in replevin seeking to recover the policies in which it was claimed that the first set of beneficiaries were the owners and entitled to possession thereof. Neither insurance company was made a party to the litigation. The Court determined that the one set of beneficiaries was entitled to the possession of the policy and concluded by saying:

“The insurer would not pay the beneficiary without the surrender of the policy or some evidence of its loss or destruction, and we do not apprehend that any court would require the insurer to pay the proceeds of the policy under the testamentary provision of the insured after payment had been made to the designated beneficiary and the policy surrendered. There are numerous cases holding that a policy may be assigned by the insured without the consent of the beneficiary, where there is no vested interest in the beneficiary, and, if the insured quits paying the premiums and the policy lapses, the beneficiary loses his interest therein along with the insured, and we can perceive no valid reason why, under similar conditions, a testamentary provision may not have the effect of changing the beneficiary. In the case before us, the beneficiary had no vested interest during the lifetime of the insured and neither did the legatee under the will. Both provisions became effective on his death. The provision in the will conflicted with the provision in the policy designating appellant as beneficiary, and, this being the insured’s last expression on the subject, it ought to control.

“Neither insurance company is a party to this litigation. So far as this record discloses, no proof of death has ever been made, and, of course,

what we have here said is not conclusive as against the insurance companies, as only the rights of the parties to this litigation are here decided." (Emphasis ours.)

BETTY M. JACOBY IS THE BENEFICIARY OF THE POLICY AND ENTITLED TO THE DEATH BENEFITS UPON THE DEATH OF JACOBY.

Further, the Court in Arkansas did not change the designation of Betty M. Jacoby as beneficiary of the policy. (Finding XVII, Tr. p. 32.) The Conclusions of Law (III, Tr. p. 34) state:

"Betty M. Jacoby is the beneficiary of the extended term insurance upon the life of Lionel A. Jacoby as provided in defendant Bankers Life Company's Policy No. 882714."

Therefore, if Lionel A. Jacoby should be now dead or if he should die before the actual and legal surrender of the policy as therein provided, Betty M. Jacoby is *ipso facto* entitled to the death benefits of the policy.

CONCLUSION.

Finally, appellee invokes the equities; but he who asks equity must do equity. The record is barren of evidence of any attempt upon the part of appellee to find Lionel A. Jacoby or Betty M. Jacoby or in any manner to secure the possession of the policy.

Finding XIX (Tr. p. 33) states, "The whereabouts of Lionel A. Jacoby are unknown." But have they al-

ways been unknown? Appellee found him once in Arkansas. Perhaps she could find him again if she made an effort. Certainly equity demands that she should try.

It is respectfully submitted the judgment should be reversed.

Dated, San Francisco, California,

May 2, 1951.

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